Supreme Court, U.S.
FILED
JUN 22 1992
OFFICE OF THE CLERK

91-2046

No.

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1991

JOSEPH MORGAN,
Petitioner,
vs.
BERNIE AISPURO, Superintendent;
ATTORNEY GENERAL OF THE
STATE OF CALIFORNIA,
Respondents.

PETITION FOR WRIT OF CERTIORARI

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I.

QUESTION PRESENTED

Does the conduct of a criminal trial in a "security courtroom," in which the gallery is separated from the court area by a wire-reinforced glass partition and bars, so inherently prejudice the rights of a defendant that it must be justified by an essential state interest specific to each trial?

LIST OF PARTIES

In the proceedings below, Joseph Morgan, petitioner herein, appeared as petitioner and appellant. Bernie Aispuro, Superintendent of the California State Prison at Corcoran, California, where petitioner was housed when he filed the original Petition for Writ of Habeas Corpus, appeared as respondent in his official capacity. (Petitioner is now housed at the California State Prison at Pelican Bay, California.) At trial, petitioner Morgan appeared as defendant, and the People of the State of California appeared as plaintiff. Before the United States Court of Appeals for the Ninth Circuit, petitioner Morgan appeared as petitioner-appellant; Superintendent Aispuro and the Attorney General of the State of California appeared as respondents-appellees.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Joseph Morgan respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on October 15, 1991. The decision denied petitioner's application for a writ of habeas corpus.

OPINION BELOW

The Order of the United States Court of Appeals for the Ninth Circuit, dated March 23, 1992, denying petitioner's petition for rehearing and rejecting petitioner's suggestion for rehearing en banc is not reported. This Order is reproduced in the Appendix hereto, pp. a8, *infra*.

The Opinion of the United States Court of Appeals for the Ninth Circuit is reported at 946 F.2d 1462 (9th Cir. 1991), and reproduced in the Appendix at pp. a1, *infra*.

JURISDICTION

Petitioner invokes the Court's jurisdiction pursuant to 28 U.S.C. Section 1254(1).

Petitioner Morgan was convicted in Superior Court, Los Angeles County, California, of murder and conspiracy to commit murder on July 6, 1981, after a jury trial. On September 1, 1989, petitioner filed a petition for writ of habeas corpus pursuant to 28 U.S.C. Section 2254 with the United States District Court, Central District of California. On May 16, 1990, the District Court dismissed the petition on the merits, with prejudice. This judgment was final and appealable *per* 28 U.S.C. Section 2244.

Petitioner filed his notice of appeal and application for certificate of probable cause on June 15, 1990. On June 28, 1990, the district court granted the certificate of probable cause. Jurisdiction of the United States Court of Appeals rested on 28 U.S.C. Section 2253. On petitioner's timely appeal, the United States Court of Appeals for the Ninth Circuit affirmed the district court's judgment on October 15, 1991. The Ninth Circuit denied the Petitioner's timely petition for rehearing and suggestion for rehearing en banc by order entered on March 23, 1992.

CONSTITUTIONAL PROVISIONS INVOLVED

The United States Constitution, Sixth and Fourteenth Amendments, Section 1, are set forth in full at Appendix, a15.

STATEMENT OF THE CASE

On April 13, 1981, the day the jury panel was to be sworn in Joseph Morgan's murder trial, the trial court announced its intention to try the case in Department 134, a security courtroom. (Appendix, a9.) Sometime within the previous half-hour, the prosecutor had told petitioner's counsel that the court was considering such a decision, but counsel had only six minutes' actual notice from the court before the announcement. (Appendix, a9.)

Petitioner's counsel objected, claiming surprise:

"I strenuously object to this case being moved to Department 134.

"If the Court intends to overrule my objection to that, then I intend to ask for a stay to take a writ to the Court of Appeal on this, and it's for several reasons.

"The record should reflect that Department 134 differs from any and all other courtrooms in this building in the following manner.

"It has been deemed and labeled a high security courtroom. It has bars. It has wire meshing. It has reinforced glass and steel from ceiling to floor. This is in the area separating the spectators from the court area itself. It's also set up a little bit differently in terms of security, physically set up a little bit different within the confines of the court area as opposed to the spectator area.

"There is nothing that has occurred to my knowledge since the history of this case which has been, oh, twelve, thirteen, fourteen months, something like that, that has ever — at least like I say that's been brought to may attention that has caused anybody any problems in terms of security. That kind of atmosphere is a repressive atmosphere. It is a highly intimidating atmosphere. It creates an ambience in the courtroom that affects jurors' attitudes, in my mind's eyes, in terms of the way they view things.

"I am not prepared at all, and I have not been prepared at any time since I was only informed of this within the last half hour to have this case tried down there.

"I object to it. There is nothing to indicate any need for it or any reason for it.

"Mr. Morgan has never posed any threat to anyone in this courtroom, nor has either of the other two defendants, Mr. Guzman or Miss Pacheco.

"We went through a preliminary hearing where we saw practically all of the prosecution's case and witnesses. There

were no problems there. In fact, I think during the course of that hearing, Magistrate Erickson removed the metal detector that was set up — a portable one that was set up outside the courtroom doors.

"I don't see the need. Of course, maybe there are things that I'm not aware of. If so, I think they should be stated on the record. I don't see the need based on my knowledge of what's going on in this case for me to move them. I object to going there."

(Appendix, a9-10.)

Petitioner's counsel requested of the trial court three discrete forms of relief. First, he entered his objection to the removal of the trial to Department 134. (Appendix, a9.) Second, he requested a stay to "get a writ together to send it over to the Court of Appeal to have them rule." (Appendix, a10-11.) Finally, he requested a continuance to confer with co-counsel. *Id.*

The trial court responded to petitioner's counsel as follows:

"First of all, for the record, we know that certain of the witnesses have been in some type of protective custody for a long period of time. In fact, many months. And it is felt that we are at the crucial moment or moments for the appearance of witnesses in this matter.

"Mr. Morgan nor Mr. Guzman nor Miss Pacheco have in fact ever threatened the security of the court. The Court does not want to imply that.

"However, the Court does feel that it is necessary to protect all witnesses and court personnel if in fact something were to happen, and feels that this is the type of case that should have that type of protection.

"The Court has never implied that Mr. Morgan or Mr. Guzman or Miss Pacheco has ever done anything other than oral outbursts in this court, and it's not even taking that into consideration to threaten in any way this Court. I don't want to imply that. I do think that we need to protect — if

that is so needed to the utmost of the Court's availability — the witnesses who may testify in this matter.

"The Court feels that each defendant will receive a fair trial whether it's tried here in this court or in Department 134.

"The only thing I can say about Department 134 is that it has poor lighting. Other than that it is pretty much like this Department. It is a security-type of court. But the Court does feel that it is necessary to do that at this time."

(Appendix, a11-12.)

Petitioner's counsel responded that: "You can look out and see the spectators in this courtroom. They can see me. They're not peering through glass. There isn't wire steel meshing. There aren't steel bars." (Appendix, a12.)

Petitioner's counsel pointed out that the prime witness under protection, Ramon Mendoza, had recently testified in another Mexican Mafia case while under protection, with no extraordinary security measure and no problems. (Appendix, a12-13.)

The court answered that it was not aware of Mendoza's testifying in the other case, that it "doesn't keep up with where witnesses testify or if they are the same witnesses who testify in other cases as opposed to this case." (Appendix, a13.)

"So at this time, one, the motion to continue is denied.

"The objection by the defendant to have the matter heard in this Department 130 is overruled.

"The motion for a stay is denied."

(Appendix, a13.)

Later that day the jury panel was sworn in Department 130, the regular courtroom, and voir dire began. The next day jury questioning continued in 130 until the afternoon recess, after which jury selection resumed in Department 134, the security courtroom. Mendoza testified at a pretrial hearing, also the next day, in the regular courtroom, with no extraordinary security measures. All further proceedings took place in Department 134.

After seven days of deliberation, the jury convicted petitioner on all counts.

HOW THE FEDERAL QUESTION WAS PRESENTED BELOW

Petitioner Morgan appealed on several grounds to the California Court of Appeal, Second District, Division 5 (Case No. B018492). His appeal, filed in 1984, raised the security courtroom issue now before this Court. On March 25, 1986, the Court of Appeal affirmed his conviction and sentence. He petitioned the Supreme Court of California for review. Review was denied on June 20, 1986. Petitioner's petition for review also raised the security courtroom issue.

On October 13, 1988, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Central District of California. Following briefing by both sides on the merits, the District Court ruled that petitioner had not yet exhausted his state remedies. It dismissed the petition without prejudice, and told petitioner that he should exhaust his state remedies by petitioning the California Supreme Court for a writ of habeas corpus. Petitioner did so on June 21, 1989. On August 9, 1989, the California Supreme Court denied his petition.

On September 1, 1989, petitioner filed a petition for writ of habeas corpus by a person in state custody with the United States District Court, Central District of California. The security courtroom issue was the sole legal basis of this petition. After its denial, petitioner filed a notice of appeal and application for certificate of probable cause on June 15, 1990.

Petitioner's appeal argued that the imposition of the security courtroom deprived petitioner of substantive due process by compromising the presumption of innocence in his case. Petitioner contended that Department 134, the security courtroom, was an extraordinary security measure analogous to shackling. The Ninth Circuit has held that, when a trial court considers shackling a defendant, it must first be persuaded by some compelling circumstance that it needs to take some measure to maintain courtroom security, and then must pursue less restrictive alternatives before imposing physical restraints. *Jones v. Meyer*, 899 F.2d

883, 884-885 (9th Cir. 1990). Petitioner contended that the trial court failed to demonstrate this two-step analysis in his own case.

Petitioner further argued that the manner in which the trial court removed the trial to Department 134 was so summary that it deprived him of his procedural due process rights.

The United States Court of Appeals for the Ninth Circuit held that, in the case of a challenge to security measures imposed by a state trial court, a federal court must determine whether the challenged security measures were so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial. If they were not so prejudicial, the defendant must show actual prejudice. *Morgan v. Aispuro,* 946 F.2d 1462, 1464 (9th Cir. 1991), citing *Holbrook v. Flynn,* 475 U.S. 560, 572, 106 S.Ct. 1340, 1347, 89 L.Ed.2d 525 (1986).

The Court of Appeals found that petitioner had been able to show no actual prejudice, and that the security courtroom was not inherently prejudicial. *Morgan v. Aispuro,* 946 F.2d at 1465. It affirmed the judgment of the district court.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT CONFLICTS WITH APPLICABLE DECISIONS OF THIS COURT

The petitioner's prayer for relief rests on two legal grounds: first, that the conduct of this trial in Department 134, the security courtroom, deprived him of substantive due process by compromising the presumption of innocence; and, second, that the manner in which the trial court reached this decision deprived him of procedural due process by affording his counsel no time to prepare other than an impromptu objection.

The United States Court of Appeals for the Ninth Circuit's opinion, based largely on *Holbrook v. Flynn,* 475 U.S. 560, 106 S.Ct. 1340, 89 L.Ed.2d 525 (1986), held that the use of a security courtroom was not inherently prejudicial to petitioner's case, and that, absent a showing of actual prejudice, no substantive due

process analysis was necessary. *Morgan v. Aispuro,* 946 F.2d at 1465. The *Morgan* opinion cites language from *Holbrook v. Flynn,* to the effect that, "if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over." *Holbrook v. Flynn,* 475 U.S. 560, 572 (1986).

Essentially, then, the Court is presented with a "judgment call." Does the conduct of a trial in a security courtroom involve an inherent risk of prejudice similar to the risks posed by trying a defendant in prison garb (*Estelle v. Williams,* 425 U.S. 501, 96 S.Ct. 1691, 48 L.Ed.2d 126 (1976)), or presenting him to the jury bound and gagged (*Illinois v. Allen,* 397 (U.S. 337, 90 S.Ct. 1057, 25 L.Ed.2d 353 (1970)), or shackling a contumacious or allegedly dangerous defendant (*Jones v. Meyer,* 899 F.2d 883 (9th Cir. 1990); *Spain v. Rushen,* 883 F.2d 712 (9th Cir. 1989); *Stewart v. Corbin,* 850 F.2d 492 (9th Cir. 1988))? Or is this situation more closely analogous to that of *Holbrook v. Flynn?*

Holbrook was an unusual case in that, throughout its entire appellate history, the petitioner objected only to four state troopers out of a total of a dozen uniformed officers who were present during his trial. *Holbrook v. Flynn,* 475 U.S. at 570. The question actually confronting this Court in *Holbrook* was whether the twelve-man force was inherently prejudicial, as opposed to a force two-thirds its size. Not surprisingly, the Court held that it was not.

Nevertheless, this Court warned against an extension of its ruling into a universal:

> "To be sure, it is possible that the sight of a security force within the courtroom might under certain conditions 'create the impression in the minds of the jury that the defendant is dangerous or untrustworthy.' [Citation omitted.]. . . . In view of the variety of ways in which such guards can be employed, we believe that a case-by-case approach is more appropriate."

Holbrook v. Flynn, 475 U.S. at 560.

Petitioner submits that Department 134, the security courtroom with its steel-reinforced glass barrier and steel bars separating the gallery from judge and jury, was substantially prejudicial in a way that the four extra uniformed guards in *Holbrook* were not. When the public sees a security courtroom on the evening news, the defendant on trial is most often an Eichmann or a Charles Manson. (*See, e.g., Morgan v. Aispuro,* 946 F.2d at 1464, n. 1.) The implication (an implication completely warranted in the two examples just cited) is that this particular defendant must be an exceptionally evil or dangerous man.

The court below based its holding in part on the premise that the security courtroom restrained Petitioner Morgan neither more nor less than any of the trial's other participants. Because "there was no reason for the jury to infer that Morgan specifically was the reason for the security measures, the use of the security courtroom was not inherently prejudicial." *Morgan v. Aispuro,* 946 F.2d at 1465.

The logical flaw in this reasoning is that the conclusion is too inclusive. Department 134 may very well have operated to the prejudice of the petitioner's co-defendants, as well as to the petitioner. This does not mean that the petitioner himself was not prejudiced; he is simply the one whose appeal is before this Court. Besides, this Court has never held that the Sixth and Fourteenth Amendment rights of an accused must be analyzed only by comparison to those of his or her co-defendants.

Moreover, the evidence at trial renders this reasoning somewhat sophistic. The prosecution's theory was that one co-defendant had gone to petitioner, much as one might go to the Godfather, to request that a murder be committed; that petitioner had directed another to commit the murder; that this other had sub-contracted the job to a fourth party. Petitioner was at all times cast as the mastermind, the Boss of Bosses, the Moriarty. The jury could have been in little doubt as to which of the co-defendants (let alone the "other participants") occasioned the security courtroom.

In such circumstances, it is difficult, if not impossible, to demonstrate actual prejudice. *Holbrook* recognizes this problem

explicitly. "Whenever a courtroom arrangement is challenged as inherently prejudicial, therefore, the question must be not whether jurors actually articulated a consciousness of some prejudicial effect, but rather whether 'an unacceptable risk is presented of impermissible factors coming into play,' [*Estelle v.*] *Williams*, 425 U.S., at 505." *Holbrook v. Flynn*, 475 U.S. at 570.

The "impermissible factors" language actually originated in *Turner v. Louisiana*, 379 U.S. 466, 473, 85 S.Ct. 546, 13 L.Ed.2d 424 (1965). In *Turner*, the jury in a murder case was sequestered in the charge of two deputies, who were also the two principal prosecution witnesses. The two deputies ran jurors' errands, answered their questions and shepherded them every moment they were not actually in court. Notwithstanding that there was no showing of actual prejudice, this Court held, "the relationship [between jurors and deputies] was one which could not but foster the jurors' confidence in those who were their official guardians during the entire period of the trial." *Turner v. Louisiana*, 379 U.S. at 474, 13 L.Ed.2d at 430, footnote omitted.

In this case, the "impermissible factors" were the constant and ominous presence of the security barrier, its aura of association with mass murderers and Nazi war criminals, and the strong possibility that jurors would be influenced to think of petitioner as equally malevolent and dangerous.

Petitioner submits that the steel and glass barrier of Department 134 prejudiced his case (and, likely, his co-defendants') in a way that the four additional state troopers did not prejudice Flynn's. Petitioner further submits that the United States Court of Appeals' contention that, absent inherent prejudice he should be entitled to no procedural due process, represents a misreading of applicable federal law. Ample precedent requires the recordation of reasons for special or unusual, visible security measures to facilitate appellate review. *See, e.g., United States v. Theriault*, 531 F.2d 281, 285 (5th Cir. 1976); *United States v. Samuel*, 431 F.2d 610, 615 (4th Cir. 1970). The Court should grant the present petition to decide these issues.

II.

THE ISSUE RAISED IN THIS APPEAL INVOLVES AN IMPORTANT QUESTION OF LAW WHICH HAS NOT BEEN, BUT SHOULD BE, RESOLVED BY THIS COURT

This case presents, in perhaps as simple and direct a form as this Court is likely to see, the issue of where the security courtroom falls along the continuum of conspicuous security measures. On one side, the side we might term "fair territory," lie *Holbrook* and other, gentler means that do not trigger the analyses imposed in cases of inherent prejudice. On the other side, we find shackles, gags, visible restraints, and the removal from the courtroom of the contumacious defendant. As the use of security courtrooms becomes more common, the Court has the opportunity to rule quickly and clearly on this issue.

Petitioner knows of virtually no federal appellate law bearing on this question. Perhaps the only directly apposite case is *United States v. Whitehorn,* 710 F.Supp. 803, 836-841 (D.D.C. 1989). Whitehorn and her co-defendants were political radicals accused of bombing four military installations. All save Whitehorn herself had prior convictions for conspiracy, illegal possession of firearms and explosives or armed robbery. Several were arrested in possession of a substantial arsenal. The district court had no difficulty finding a compelling state interest in the imposition of security measures. It noted that:

> "[N]o reasonable person could entertain the slightest doubt that special security measures are necessary and appropriate in respect to these defendants, given their truly extraordinary records of escapes, fugitivity, violence with respect to property, plans for violence against persons, avowal of the belief they have a political duty to flee, and the incentive to flee because of the enormous number of years of federal imprisonment they face."

United States v. Whitehorn, 710 F.Supp. 803, 839-840.

Unlike petitioner, Whitehorn was afforded substantial procedural safeguards. The more than four pages of published opinion on the security courtroom issue resulted from the litigation of a

pretrial motion. It seems a warranted inference that both sides must have been granted time before trial to brief this issue.

Seven years ago, the Court found the question of whether four uniformed state troopers constituted an inherently prejudicial situation to be sufficiently important to grant Flynn's petition. The Court should grant this petition as well, to settle the same issue with respect to security courtrooms. This question is certain to arise in the future.

CONCLUSION

For these various reasons, review by this Court is appropriate and certiorari should be granted.

DATED: June 19, 1992

Respectfully submitted,

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JOSEPH MORGAN

APPENDIX A

No. 90-56320

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH MORGAN,
Petitioner-Appellant,

v.

BERNIE AISPURO, *Superintendent;*
Attorney General of the
State of California,
Respondents-Appellees.

Appeal from the United States District Court
for the Central District of California
Robert C. Bonner, District Judge, Presiding

D.C. No. CV-89-5258-RB

OPINION

Submitted September 9, 1991*
Pasadena, California

Filed October 15, 1991

Before: Robert R. Beezer, Cynthia Holcomb Hall and
Charles Wiggins, Circuit Judges.

Opinion by Judge Beezer

SUMMARY

Constitutional Law

Affirming a district court denial of a petition for habeas relief, the court of appeals held that the use of a security courtroom did not violate appellant's right to a fair trial.

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* The panel finds this case appropriate for submission without oral argument pursuant to Ninth Circuit Rule 34-4 and Fed. R. App. P. 34(a).

Appellant Joseph Morgan was tried and convicted by a jury in state court. On the day the jury panel was to be sworn in, the state trial court announced its intention to try the case in a security courtroom with a wire-reinforced glass partition and bars separating the spectator area from the court area. Morgan's counsel objected to the move and rejected the court's offer to have all proceedings take place in the security courtroom. The jury panel was sworn in and voir dire was begun in a non-security courtroom. That afternoon, the proceedings were moved to the security courtroom, where the rest of the trial took place. The district court denied Morgan's petition for habeas relief.

[1] Certain courtroom arrangements may prejudice the constitutional presumption of evidence. **[2]** Where a petitioner challenges security measures imposed by a state trial court, a federal court considering a habeas petition must determine whether what the jurors saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial. **[3]** The court held that because there was no reason for the jury to infer that Morgan specifically was the reason for the security measures, the use of the security courtroom was not inherently prejudicial. **[4]** Because the use of a security courtroom is not inherently prejudicial, the state did not have to justify its decision to try Morgan there.

COUNSEL

Roger J. Rosen and Ben W. Pesta, Los Angeles, California, for the petitioner-appellant.

Donald F. Roeschke, Deputy Attorney General, Los Angeles, California, for the respondents-appellees.

OPINION

BEEZER, Circuit Judge:

Joseph Morgan petitioned for a writ of habeas corpus on the ground that his right to a fair trial was violated by the use of a security courtroom. The district court denied his petition. We

have jurisdiction, hold that such a security measure is not inherently prejudicial and affirm.

I

Morgan was convicted in a California court of murder and conspiracy to commit murder, and was sentenced to life imprisonment on each count. On the day the jury panel was to be sworn in, the state trial court announced its intention to try the case in a security courtroom. The security courtroom had a wire-reinforced glass partition and bars separating the spectator area from the court area.

Morgan's counsel objected to the move and requested a continuance or stay to permit him to seek a writ from the California Court of Appeal. The state court judge denied the motions, but offered counsel the opportunity to have all proceedings take place in the security courtroom. Counsel refused this offer and the jury panel was sworn in and *voir dire* was begun in a non-security courtroom. The following day, jury selection continued in the non-security courtroom. After the afternoon recess, the proceedings were moved to the security courtroom, where the rest of the trial took place. Morgan was not handcuffed or subject to any other restraints in the presence of the jury, nor were there any obstructions between Morgan and his attorney, the witnesses or the trial judge.

Morgan petitioned for a writ of habeas corpus on the grounds that he was denied substantive due process by being tried in the security courtroom and that he was denied procedural due process because there was no formal hearing to determine where the trial should take place. A federal magistrate judge found that there was no due process violation and recommended that the petition be dismissed with prejudice. The district court adopted the magistrate's findings, conclusions and recommendations, and dismissed the petition. Morgan appeals.

II

We review *de novo* a district court's denial of a writ of habeas corpus, accepting its factual findings unless they are clearly

erroneous. *Jones v. Meyer*, 899 F.2d 883, 884 (9th Cir.) (citations omitted), *cert. denied*, 111 S. Ct. 95 (1990).

[1] The right to a fair trial, guaranteed by the Sixth and Fourteenth Amendments, includes the presumption of innocence. *Norris v. Risely*, 918 F.2d 828, 831 (9th Cir. 1990). Certain courtroom arrangements may prejudice this presumption. *See, e.g., Estelle v. Williams*, 425 U.S. 501 (1976) (forcing defendant to wear prison clothes before the jury may affect jurors' judgment); *Illinois v. Allen*, 397 U.S. 337 (1970) (defendant may be prejudiced if he appears before the jury bound and gagged).

[2] Where a petitioner challenges security measures imposed by a state trial court, the task of the federal court considering a habeas petition

> is not to determine whether it might have been feasible for the State to have employed less conspicuous security measures in the courtroom .... All a federal court may do in such a situation is look at the scene presented to jurors and determine whether what they saw was so inherently prejudicial as to pose an unacceptable threat to defendant's right to a fair trial; if the challenged practice is not found inherently prejudicial and if the defendant fails to show actual prejudice, the inquiry is over.

Holbrook v. Flynn, 475 U.S. 560, 572 (1986). Morgan has made no showing of actual prejudice.[1] We must determine, therefore, whether the use of the security courtroom was inherently prejudicial. This depends on whether "an unacceptable risk [was] presented of impermissible factors coming into play." *Id.* at 570 (quotation omitted).

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[1]The only suggestion of actual prejudice is that during *voir dire*, one venireperson stated that the security barrier reminded her of pictures she had seen during the trial of Charles Manson. There is no indication that this venireperson was a member of the petit jury.

We have held that the use of shackles, handcuffs or gags during trial may interfere with a fair trial.[2] *See e.g., Jones*, 899 F.2d 993; *United States v. Halliburton*, 870 F.2d 557 (9th Cir.), *cert. denied*, 493 U.S. 910 (1989). We have never addressed, however, the question whether the use of a security courtroom may have the same effect.

In *Holbrook*, the Supreme Court determined that the presence of additional uniformed state troopers during trial was not "the sort of inherently prejudicial practice that, like shackling, should be permitted only where justified by an essential state interest specific to each trial." 475 U.S. at 568-69. The Court reached this conclusion because the presence of guards could cause a reasonable jury to draw inferences other than that the defendant was "particularly dangerous or culpable." *Id.* at 569. For example, the guards could be present "to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence." *Id.* The Court noted that "[o]ur society has become inured to the presence of armed guards in most public places," and concluded that it was "entirely possible that jurors [would] not infer anything at all" from the guards' presence. *Id.*

[3] The present case is similar. Security measures other than armed guards are common in government buildings. The security arrangements used here neither restrained Morgan any more than any of the other participants in the trial nor kept him separate from the witnesses, the judge or (presumably) the jury. We hold,

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[2]In *Jones*, we enumerated a number of ways in which shackling may interfere with the right to a fair trial:

> (1) shackles may reverse the presumption of innocence by causing jury prejudice; (2) shackles may impair the defendant's mental faculties; (3) shackles may impede communication between the defendant and his counsel; (4) shackles may detract from the decorum of the judicial proceeding; (5) shackles may cause pain to the defendant.

899 F.2d at 885 (citation omitted). The only of these concerns arguably present in this case is the possible effect of the use of the security courtroom on the presumption of innocence.

therefore, that because there was no reason for the jury to infer that Morgan specifically was the reason for the security measures, the use of the security courtroom was not inherently prejudicial. *See id.* at 571 (security measures did not "brand respondent in [jury's] eyes with an unmistakable mark of guilt") (quotation omitted).

Morgan argues that the jury is more likely to be prejudiced if they are aware that the security measures being used are extraordinary. *See Dorman v. United States*, 435 F.2d 385, 397 (D.C. Cir. 1970). He argues that because the proceedings began in a normal courtroom and were subsequently moved to the security courtroom, there was an increased likelihood of prejudice.

In *Holbrook*, the Supreme Court stated that "[e]ven had the jurors been aware that the deployment of troopers was not common practice in Rhode Island, we cannot believe that the use of the [sic] four troopers tended to brand respondent in their eyes with an unmistakable mark of guilt." 475 U.S. at 571 (quotation and citations omitted). The same is the case here. Furthermore, Morgan's counsel refused the opportunity to limit the implication that the security measures were extraordinary by having all proceedings take place in the security courtroom. He cannot now use that decision to create a jury inference of Morgan's guilt. *Cf. Estelle*, 425 U.S. at 512-13 (failure to object to being tried in prison attire sufficient to negate constitutional violation); *Gilmore v. Armontrout*, 861 F.2d 1061, 1071-72 (8th Cir. 1988) (failure to object to the use of restraints), *cert. denied*, 490 U.S. 1114 (1989).

[4] Morgan's final argument is that the trial court did not present sufficient reasons for holding the trial in the security courtroom and that the magistrate's findings supporting the need for security were clearly erroneous. The cases cited by Morgan to support the requirement that the trial court enunciate a compelling need for security measures are cases in which the defendant was shackled.[3] In *Holbrook*, the Supreme Court differentiated

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[3]In *Jones*, 899 F.2d at 885, we stated that a court must, first, demonstrate compelling circumstances justifying the security measure;

between the use of shackles and the deployment of security personnel. Because the latter is not inherently prejudicial, the Court held that no essential state interest was required to justify the practice. 475 U.S. at 568-69. Because we hold that the use of a security courtroom is not inherently prejudicial, the state does not have to justify its decision to try Morgan there.[4] The two-part test we enunciated in *Jones*, 899 F.2d at 885, applies only to inherently prejudicial security measures, such as shackling.

III

The judgment of the district court dismissing the petition is AFFIRMED.

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and second, assess whether there are less restrictive alternatives. Morgan also cites *Spain v. Rushen*, 883 F.2d 712 (9th Cir. 1989), *cert. denied*, 110 S. Ct. 1937 (1990).

[4]This conclusion and our previous holding that a state trial judge need not hold a hearing before deciding to require a defendant to be shackled during trial, *Jones*, 899 F.2d at 886, make clear that the trial judge was not required to hold a hearing before moving into the security courtroom.

No. 90-56320

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOSEPH MORGAN,

Petitioner-Appellant,

v.

BERNIE AISPURO, Superintendent;
ATTORNEY GENERAL OF
THE STATE OF CALIFORNIA,

Respondents-Appellees.

D.C. No. CV-89-5258-RB
Stamp Filed 3/23/1992

ORDER

Before: BEEZER, HALL, and WIGGINS, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge in active service has requested a vote to rehear the matter en banc.

Pursuant to Rule 35(b) of the Federal Rules of Appellate Procedure, the petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

EXCERPTS FROM REPORTERS'
TRANSCRIPT ON APPEAL

Pursuant to Sup. Ct. R. 14.1(h), petitioner submits the following verbatim excerpts from the Reporters' Transcript on Appeal, originally paginated as pp. 1111A-1117A, and in the Excerpts of Record before the United States Court of Appeals for the Ninth Circuit as pp. E30-E37:

THE COURT: All right. Thank you. The Court will take care of that. The Court has apprised counsel at the bench and is going to apprise all defendants that it intends to proceed in this trial not in this courtroom but in Department 134 which is a security courtroom.

The Court has also apprised counsel that we can do it two ways.

We can have the jury panel come into this court and do the selection in here and advise the panel that in fact this matter will be tried in another courtroom, or we can start all of the proceedings with regard to jury selection and trial in that Department.

Do any of defense counsel wish to be heard on this?

MR. ROSEN: Yes, I do.

THE COURT: All right.

MR. ROSEN: I think there are two parts to this issue. If I may address them in that order.

First of all, I want the record to reflect that Mr. Morgan does not consent in any sense of the word to have this case tried in that courtroom.

I want the record to reflect that we were informed of this for the first time five minutes ago — six minutes ago by the Court.

I have been given no prior notice whatsoever. Strike that. I have been given some prior notice within a half hour prior to that by Mr. Choate who informed me that the Court was considering that issue.

Prior to that, I have had no knowledge whatsoever that the Court was considering moving this case to another courtroom for trial.

Obviously, if it was moved to any other court — and they are all somewhat functionable in this building, with the exclusion of Department 134, I wouldn't have any problems with that. I strenuously object to this case being moved to Department 134.

If the Court intends to overrule my objection to that, then I intend to ask for a stay to take a writ to the Court of Appeal on this, and it's for several reasons.

The record should reflect that Department 134 differs from any and all other courtrooms in this building in the following manner.

It has been deemed and labeled a high security courtroom. It has bars. It has wire meshing. It has reinforced glass and steel from ceiling to floor. This is in the area separating the spectators from the court area itself. It's also set up a little bit differently in terms of security, physically set up a little bit different within the confines of the court area as opposed to the spectator area.

There is nothing that has occurred to my knowledge since the history of this case which has been, oh, twelve, thirteen, fourteen months, something like that, that has ever — at least like I say that's been brought to my attention that has caused anybody any problems in terms of security. That kind of atmosphere is a repressive atmosphere. It is a highly intimidating atmosphere. It creates an ambience in the courtroom that affects jurors' attitudes, in my mind's eyes, in terms of the way they view things.

I am not prepared at all, and I have not been prepared at any time since I was only informed of this within the last half hour to have this case tried down there.

I object to it. There is nothing to indicate any need for it or any reason for it.

Mr. Morgan has never posed any threat to anyone in this courtroom, nor has either of the other two defendants, Mr. Guzman or Miss Pacheco.

We went through a preliminary hearing where we saw practically all of the prosecution's case and witnesses. There were no problems there. In fact, I think during the course of that hearing, Magistrate Erickson removed the metal detector that was set up — a portable one that was set up outside the courtroom doors.

I don't see the need. Of course, maybe there are things that I'm not aware of. If so, I think they should be stated on the record. I don't see the need based on my knowledge of what's going on in this case for them to move them. I object to going there.

In fact, if the Court overrules my objection, then I'm going and I will inform the Court that I am asking for a short stay so that I

can get a writ together to send it over to the Court of Appeal to have them rule.

Secondly, if in fact the Court does intend to have the matter heard in Department 134, I am going to ask for a short continuance so that I can confer with my cocounsel as well as the defendants to get their input as to what they want to do. Basically, I have a primary objection, and that is, this is the first time that it's been sprung on us. That is, I would say, a fairly important case to the defendants. If they are convicted of what Mr. Choate claims they've done in this case, they face imposition of a life top on this case. And I think to make a decision like that, an important decision, it shouldn't be made off-the-cuff. And it certainly should be made only after the defense and the defendants have had time to prepare if in fact that's where it's going to wind up. That is, if the Court decides to overrule my objection and some other higher court of review decides to go ahead and move it down to Department 134. But absent that, it's my position that this is the day for trial. And to be quite frank with the Court, it struck like a bombshell.

THE COURT: All right. Any other defense counsel wish to be heard?

MR. OWEN: We would like to join in Mr. Rosen's motion.

MR. MARSHALL: I would join in that argument.

THE COURT: All right. The Court is going to make some observations.

First of all, for the record, we know that certain of the witnesses have been in some type of protective custody for a long period of time. In fact, many months. And it is felt that we are at the crucial moment or moments for the appearance of these witnesses in this matter.

Mr. Morgan nor Mr. Guzman nor Miss Pacheco have in fact ever threatened the security of the court. The Court does not want to imply that.

However, the Court does feel that it is necessary to protect all witnesses and court personnel if in fact something were to happen,

and feels that this is the type of case that should have that type of protection.

The Court has never implied that Mr. Morgan or Mr. Guzman or Miss Pacheco has ever done anything other than oral outbursts in this court, and it's not even taking that into consideration to threaten in any way this Court. I don't want to imply that. I do think that we need to protect — if that is so needed to the utmost of the Court's availability — the witnesses who may testify in this matter.

The Court feels that each defendant will receive a fair trial whether it's tried here in this court or in Department 134.

The only thing I can say about Department 134 is that it has poor lighting. Other than that, it is pretty much like this Department. It is a security-type of court. But the Court does feel that it is necessary to do that at this time.

Do you wish to be heard?

MR. ROSEN: Yes. Mostly, I totally disagree with the Court. I don't see any similarity to this courtroom and the courtroom in 134.

The moment you walk into 134 as a spectator or as juror, you are met with that repressive attitude.

You don't have that here. You have free flow of air. The air goes back and forth. You can look out and see the spectators in this courtroom. They can see me. They're not peering through glass. There isn't wire steel meshing. There aren't steel bars.

Secondly, the prime witness in this case that the Court is referring to, I assume, is Mr. Mendoza who has been in protective custody for some time in the Tehachapi Witness Protection Program.

The interesting thing is that Mr. Mendoza not long ago testified in Mr. Sanchez's trial right down the hallway here. I think in 115 downstairs in a courtroom that looks exactly like this courtroom. He was in protective custody. At that time, he was in Tehachapi. He was in the witness protection program. He came in. He gave his testimony in that courtroom. And again in that case, Eme was

supposedly involved in the thrust and in the theme of the case. Not one single problem. Mr. Sanchez, it was alleged, was a member of Eme. Mr. Mundo, Ramon Mendoza, was alleged to have been a member of Eme. Supposedly, there were some witnesses with Mr. Morgan out of the same unit. No problems whatsoever. I fail to see any problems if in fact the Court has said that it's not holding anything against Mr. Morgan or anticipatory conduct toward Mr. Morgan

THE COURT: All right. The Court was not apprised of Mr. Mendoza testifying anyplace else. It doesn't keep up with where witnesses testify or if they are the same witnesses who testify in other cases as opposed to this case.

MR. ROSEN: Well, I'm telling the Court that. You can inquire of Mr. Choate. It did happen.

THE COURT: I am just saying I have not been apprised of that. I have done that strictly on what I feel is necessary in this case and after much thought on my part.

The Court feels that most prospective jurors are apprehensive when they go into any court in the criminal justice system. But once they get to the actual part of sitting as a juror in a particular case, they want to hear the evidence. That's this Court's feeling.

So at this time, one, the motion to continue is denied.

The objection by the defendant to have the matter heard in this Department 130 is overruled.

The motion for a stay is denied.

MR. ROSEN: Your Honor, may the record reflect that as far as the stay goes, all I am asking for is until the end of the week which is four days.

THE COURT: The stay is denied.

Now, the Court wanted to do this morning, and will take it all the way down to 134 at this point if you want to start there, but the Court is going to empanel a jury this morning. It wants to empanel the jury this morning, swear them in, and then put this matter over for the actual *voir dire* procedure until tomorrow in the afternoon.

MR. MARSHALL: Well, Your Honor, it's approximately two-and-a-half hours to San Diego.

THE COURT: They're here.

MR. MARSHALL: Well, Your Honor, is talking about empaneling a jury.

THE COURT: Swear them in. That's it. Just swear them in.

MR. ROSEN: Your Honor, I am willing to stand in for Mr. Marshall if that helps him.

MR. MARSHALL: I don't want a jury empaneled in my absence. I have to be here while they're sworn in.

THE COURT: That's just to swear them in.

MR. ROSEN: I have no objection to that. My objection is that Mr. Morgan is in jail blues. They did no bring him over dressed in civilian clothes. And Mr. Guzman is dressed in jail blues.

I object to the panel seeing them this way because they're going to be clothed in civilian dress during the course of the trial.

THE COURT: This is the first time that I have been apprised that they were supposed to be in their civilian clothes.

Are you representing Mr. Guzman too, Mr. Rosen?

MR. ROSEN: I think that I can make that observation.

THE COURT: Are you representing Mr. Guzman?

MR. ROSEN: No, I'm representing Mr. Morgan, Your Honor.

CONSTITUTION OF THE UNITED STATES

AMENDMENT VI — JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

AMENDMENT XIV — CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPORTIONMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.